ANTONY DOMINIC, C.J.
&
DAMA SESHADRI NAIDU, J.

W.P.(C) No. 7778 of 2018

Dated: 08th March 2018

J U D G M E N T

Dama Seshadri Naidu, J.

A citizen, seemingly sensitive and scrupulous, cries foul at, what he terms, the Society's moral decadence. He draws our attention to the Ext.P1 cover page of a magazine depicting a mother feeding her baby, exposing her bosom. The caption reads "തറചന#$കരത(ഞങശക(മലയടണ1" which translates to "Don't stare, we have to breastfeed".

2. According to Felix M A, the petitioner, it offends Sections 3(c) and 5(j), III of Protection of Children from Sexual Offences Act and Rules, as well as Section 45 of the Juvenile Justice Act. He has also roped in Sections 3 and 4 of Indecent Representation of Women (Prohibition) Act, 1986, and Article 39(e) and (f) of the Constitution of India.

3. "Shocking one's morals" is an elusive concept, amorphous and protean. What may be obscene to some may be artistic to other; one man's vulgarity is another man's lyric, so to say. Therefore, we can only

be subjective about Ex.P1 magazine cover depiction.

4. We do not see, despite our best efforts, obscenity in the picture, nor do we find anything objectionable in the caption, for men. We looked at the picture with the same eyes we look at the paintings of artists like Raja Ravi Varma. As the beauty lies in the beholder's eye, so does obscenity, perhaps.

5. Even the sections relied on by Felix fail to convince us that the respondent publishers have committed any offence, much less a cardinal one, affecting the Society's moral fabric, and offending its sensibilities.

6. May we observe, Indian psyche has been so mature for ages that it could see the sensuous even in the sacred. The paintings in Ajanta and the temple architecture are cases in point.

7. Throughout their long history, the arts of India—both visual and literary—have consistently celebrated the beauty of the human body, notes the much-acclaimed travel-writer, William Dalrymple. Indeed, the whole tradition of yoga, he continues, was aimed at perfecting and transforming the body, with a view, among the higher adepts, to making it transcendent, omniscient, even god-like. *The body, in other words, is not some tainted appendage to be whipped into submission, but potentially the vehicle of divinity. In this tradition, the sensuous and the sacred are not opposed. They are one, and the sensuous is seen as an integral part of the sacred.* The gods were always depicted as super-humanly beautiful, for if the image was not beautiful then the deities could not be persuaded to inhabit the statue. We

could not express better than what Dalrymple has said in his lyrical prose. (italics supplied)

8. Kama Sutra—the Aphorisms of Love—composed by Vatsyayana many millennia ago, is the first scientific treatise in the world on eroticism.

9. In a provocatively titled chapter—Obscenity Lies in the Crotch of the Beholder—of his book *Republic of Rhetoric: Free Speech and the Constitution of India*,[1] Abhinav Chandrachud wonders whether sexually arousing material be banned merely because somebody might get addicted to sex? After all, there is much in the modern world, he answers, which is addictive, yet legal: cigarettes, alcohol, even chocolates, present easy examples. He then cautions that "to censor pornography because it degrades women sends us down the path of a slippery slope."[2]

10. The earliest case to book judicial bounds to nebulous concept of obscenity was *Regina v. Hicklin* decided by the House of Lords in 1868. Justice Cockburn, in that case, defined the test to be whether the tendency of the matter, charged as obscenity, is to declare incorrect those whose minds are open to such immoral influences and into whose hands a publication of this ought may fall. Indeed, obscenity is a weapon of cultural regulation. Either the U.K. or the U.S.A. or India, for that matter any common law Country, one other shape the entire jurisprudence of obscenity: Lady Chatterley's Lover by D.H. Lawrence.

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1 (Kindle Locations 2636-2638). Penguin Random House India Private Limited. Kindle Edition.
2 Id. (Kindle Locations 2678-2679)

11. In India, *Renjith D. Udeshi v. State of Maharashtra*[3] was the first opportunity for the Supreme Court to engage with this hitherto shunned talk directly. In the context of Article 19(2), the Supreme Court has defined obscenity to mean offensive to modesty or decency; lewd, filthy, and repulsive. It cannot be denied that it is an important interest of Society to suppress obscenity. Referring to the right of free speech, *Renjith Udeshi* observed that obscenity which is offensive to modesty or decency cannot be claimed to be within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. This freedom, *Renjith Udeshi* further notes, is "subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality."

12. Indeed, Article 19(2) aims at maintaining only public order, decency, or morality, the last two of which are elastic. In his well-researched and well-presented book, *Offend, Shock, Or Disturb: Free Speech Under the Indian Constitution,*[4] Gautam Bhatia comments that "the constitutional text and history does not support Justice Hidayatullah's uncritical equation of *decency or morality* with *public decency and morality*".[5] The learned author tellingly observes that Article 19(2) has "no public interest exception," for the rights of free expression, assembly, and association—19(1)(a), (b), and (c)—are far too important to be subjected to a general public interest.

3 AIR 1965 SC 881
4 OUP, 2016, Kindle Edition.
5 Id., location 2550

13. Our effort to define, to confine, or even to subjugate ‘obscenity’ has never been smooth. Rather, the Constitutional Courts have decided to adopt the changing mores of the marching civilization and the changing societal sensitivities. They have begun to view 'obscenity' from a prism of ‘reality'. So our journey on this interpretative path has not come to an end, as yet.

14. In *Bobby Art International v. Om Pal* [6] (*Bandit Queen* movie), the Supreme has observed that nakedness does not always arouse the baser instinct. Recently *Naz foundation Vs. Government of NCT of Delhi* [7] has held that popular morality, as distinct from a constitution morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. After dwelling on Hart’s and Dworkin’s views, Gautam Bhatia reminds us of the basic purposes behind an entrenched Bill of Rights. One of the purposes, according to him, is to protect minorities against the legislative power of an extant majority. There would be little meaning in having a fundamental right if majority sentiment was all that was required to override it. Once again, Justice Jackson’s words in *West Viriginia Board of Education v. Barnette*[8] resonate most profoundly on this point:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other

6 (1996) 4 SCC 1
7 160 (2009) DLT 277
8 319 U.S. 624, 638 (1943)

> fundamental rights may not be submitted to vote; they depend on the outcome of no elections. [9]

15. Then, echoing Justice Oliver Wendell Holmes Jr., Gautam Bhatia wants us to value the "exchange of competing ideas" as constituting the public discourse. He laments that if free expression is curtailed in the name of public morality, there a "particular harm" to the democracy.

16. We cannot, as a nation—people of all shades of faith and belief—afford to chain ourselves to the past, glorious it may have been. That glory, in fact, was a change and almost an abomination for those living then. Only from the prism of the present, that past appears to be glorious. Who knows what we detest now, as our ancestors did then, as decadence may be its very glory, viewed from a distant tomorrow. No nation desiring progress could afford to have its people chained to the past. Even water stagnant stinks, flowing fascinates. As Steven Pinker[10] observes, "[C]ultural memory pacifies the past, leaving us with pale souvenirs whose bloody origins have been bleached away."

17. Pinker notes how the pain of past is painted over as a cover of culture. "A woman donning a cross seldom reflects that this instrument of torture was a common punishment in the ancient world; nor does a person who speaks of a *whipping boy* ponder the practice of flogging an innocent child in place of a misbehaving prince. We are surrounded by sings of the

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9 (Kindle Locations 2645-2649). OUP India. Kindle Edition.

10 Better Angels of Our Nature; Why Violence Has Decliend, Viking, 2011, 61 of 3537 (ebook)

depravity of our ancestors' way of life, but we are barely aware of them." [11] We may observe that culture is a loaded label: for some it is a badge of honour, and for others it is a symbol of shame. A white supremacist's culture is a Blackman's slavery, apartheid and untouchability being no different. After all, one man's pride is another man's shame.

18. Silence caused by law, in the words of Justice Brandeis, is the argument of force in the worst form. [12] In *On Liberty*, John Stuart Mill memorably laid down the Harm Principle: '*The only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others'*. His own good, whether physical or moral, is not a sufficient warrant.[13]

19. Bhatia poignantly notes, "[l]egal paternalism involves the use of law to prevent a person from causing harm to herself, whatever her own views on the matter (for example, laws against smoking, or laws requiring the wearing of seat belts). Legal paternalism assumes that in certain matters, it is the State that knows best what is in the interests of its citizens and can, therefore, compel them to act in accordance with their own best interests, whether they know or agree with it or not. Legal moralism, on the other hand, justifies prohibiting action on the sole ground of immorality (public or private), regardless of harm." He finally notes that legal ~~moralism~~

11 Id.
12 Whiney v. California, 274 US, 357, 376, as quoted in *Offend, Shock, or Disturb* (2645 ebook)
13 Id.

contradicts liberal neutrality because it "involves the State in privileging certain ways of life over others, and enforcing that privilege through the criminal law."[14]

20. Indeed, the Supreme Court has been frequently called upon to examine the nuances of this nebulous 'obscenity': *Chandrakant Kalyandas Kakodar Vs. State of Maharashtra* [15] ; *Samaresh Bose Vs. Amal Mitra*[16] , and *Khushboo Vs. Kanniammal*[17]. In all these cases, it has progressively relaxed the rigours of the standards concerning obscenity and immorality. Pertinently, *Kushboo* echoes Justice Brandeis's view in *Whitney v. California*[18] that the remedy for falsehood is 'more speech, not enforced silence'.[19]

21. In *Aveek Sarkar Vs. State of West Bengal*[20] , the Supreme Court, perhaps for the first time, abandoned Hicklin test. Citing the examples of several countries where Lady Chatterley's Lover had been held not to be obscene, the Court held that the Hicklin test is not the correct test to be applied to determine what is obscene. Instead, the Court cited the 1957

American case of *Roth Vs. United States* [21]. It then went on to observe thus:

> A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind [sic] and

14 Id., (Kindle Locations 2697-2699). OUP India. Kindle Edition.
15 1970 (2) SCR 80
16 1985 SCR Sppl. (3) 17
17 2010 (5) SCC 600
18 274 U.S. 357 (1927)
19 Republic of Rhetoric (Kindle Locations 2281-2284).
20 (2014) 4 SCC 257
21 354 US 476 (1957)

> designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of 'exciting lustful thoughts' can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.

22. On this point, whether *Aveek Sarkar* is the first case to veer away from Hicklin test, Abhinav Chandrachud, in an equally-illuminating book, *Nation of Rhetoric*,[22] presents an alternative view. According to the learned author, the Hicklin test was formally abandoned by the Supreme Court in that case. But, in truth, courts in India had repeatedly modified, he goes on to observe, the Hicklin test and the judgment of the Supreme Court in *Aveek Sarkar* did not modify the Hicklin test any further than what the court's previous judgments had already done.

23. Nevertheless, post *Aveek Sarkar*, we have the "Contemporary-Community-Standards test," a test adapted from *Roth,* and it represents a shift from the old 'tendency to deprave or corrupt' test to whether 'the work, taken as a whole, appeals to the prurient interest.' Granted, even this new-found test was soon abandoned. In *Memoirs v. Massachusetts*,[23] and in *Miller v. California*.[24] *Miller,* in fact, the US Supreme Court has refined the obscenity test and introduced the patent-offensiveness test.

24. We travel no further. We reckon *Aveek Sarkar* squarely answers the petitioner's allegation. Going by the contemporary community standards

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22 (Kindle Locations 2240-2242).
23 383 U.S. 413 (1966)
24 413 U.S. 15 (1973)

—and without troubling ourselves with patent offensiveness—we may observe that, given the picture's particular posture and its background setting (mother feeding the baby), as depicted in the magazine, it is not prurient or obscene; nor even suggestive of it. We, therefore, dismiss the writ petition.

No order on costs.

Sd/- ANTONY
DOMINIC, CHIEF
JUSTICE.

Sd/-
DAMA SESHADRI NAIDU,
JUDGE.

jjj 08/03/2018